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ORIGINAL

NO. 85-5747

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOEL DALE WRIGHT
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of Florida, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Florida Supreme Court's opinion in this case.

QUESTIONS PRESENTED

A. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT EXCLUSION OF THE TESTIMONY OF A DEFENSE WITNESS WHO HAD VIOLATED THE RULE OF SEQUESTRATION WAS HARMLESS ERROR WHEN THIS QUESTION IS SO EXPLICITLY FORECLOSED BY PRIOR DECISIONS OF THIS COURT AS TO LEAVE NO ROOM FOR REAL CONTROVERSY, THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY, AND THE ISSUE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

B. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES AS QUESTIONS OF FACT MAY BE FOUND BY THE TRIAL JUDGE RATHER THAN BY THE JURY WHEN THIS QUESTION HAS BEEN DISPOSED OF BY THIS COURT ON NUMEROUS OCCASIONS.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties.

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STATEMENT OF THE CASE

The respondent rejects the petitioner's statement of the case and facts as slanted and as too narrow to afford this Court the complete overview of the proceedings below necessary to its determination of whether it should exercise certiorari jurisdiction in this cause. A more detailed history is set forth in the opinion of the Florida Supreme Court in Wright v. State, 10 F.L.W. 364 (Fla. 1985), set out herein for the convenience of the Court. Further references will be drawn from the proffer of excluded testimony included in petitioner's appendix as Appendix F.

The petitioner, Joel Dale Wright, was convicted of first-degree murder, sexual battery, burglary of a dwelling, and second-degree grand theft. In accordance with the jury's sentence recommendation, the trial judge imposed the death sentence for the first-degree murder. The petitioner also received sentences of 99 years for sexual battery, 15 years for burglary, and 5 years for grand theft.

The facts reflect that the body of a 75-year-old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Finding all the doors to her home locked, he entered through an open window at the rear of the house and subsequently found her body. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.

The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, petitioner came to Westberry's trailer and confessed to him that he had killed the victim; that petitioner told him he entered the victim's house through a back window to take money from her purse and, as petitioner wiped his fingerprints off

the purse, he saw the victim in the hallway and cut her throat; and that petitioner stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that petitioner counted out approximately $290.00 he said he had taken from the victim's home and that petitioner asked Westberry to tell the police that he had spent the night of February 5 at Westberry's trailer. When Westberry related petitioner's confession to his wife several weeks later, she notified the police. The record reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to petitioner. Paul House testifed for the state that approximately one month before the murder, he and petitioner had entered the victim's home through the same window that was found open by the victim's brother, and had stolen money.

In his defense, petitioner denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m. to attend a party at his employer's house. Testifying in his own behalf, he stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. He testified that he then walked by way of Highway 19 to Westberry's trailer, where he spent the night. He also presented a witness who testified that, late in the night of February 5 and early in the morning of February 6, he had seen a group of three men whom he did not recognize in the general vicinity of the victim's home.

After the close of the evidence, but prior to final arguments, petitioner proffered the newly discovered testimony of Kathy Waters, who had listened to portions of the trial testimony, followed newspaper accounts of the trial, and discussed testimony with various persons attending the trial; had gone to school with the petitioner's two sisters and had one

of the sisters to her house for dinner the previous Monday, where they discussed the trial and certain testimony. Her proffered testimony revealed that, shortly after midnight on February 6, she had observed a person, who may have been similar in appearance to petitioner walking along Highway 19, and had also seen three persons, whom she did not recognize, congregated in the general vicinity of the victim's house. The trial court denied petitioner's motion to re-open the case, noting that the rule of sequestration is rendered "meaningless" when a witness is permitted "to testify in support of one side or the other, almost as if that testimony were tailor-made", after the witness has conferred with numerous people concerning the case.

Petitioner contended it was reversible error for the trial judge to deny the proffered witness an opportunity to testify. The record reveals that, during the hearing held by the trial court on the matter, the defense asserted that Waters' observation of three persons in the vicinity of the victim's home and one person walking on State Road 19 was relevant and exculpatory in that it tended to corroborate petitioner's otherwise uncorroborated testimony and could imply to the jury that others had an opportunity to break into the victim's home and kill her. While acknowledging that "there is no question that the violation of the rule [of sequestration] was inadvertent", the state argued that it "could very well be substantially prejudiced" if the witness was permitted to testify. The transcript of the hearing also reflects that the excluded witness did not become aware of the fact that she possessed relevant information until the morning her testimony was proffered, at which time she came forward of her own volition. In ruling to exclude the evidence, the trial judge attributed no "bad motive or bad faith" to the defense in its failure to proffer the testimony before the close of the evidence.

The jury found petitioner guilty as charged. Petitioner, in the penalty phase, presented the testimony of members of his family relating to his character and upbringing as well as a

nine-year old psychological report which indicated that at that time he was depressed, emotionally immature, and had difficulty controlling his impulses. By a nine-to-three vote, the jury recommended that petitioner receive the death sentence.

In imposing the death sentence, the trial judge found the following four aggravating circumstances: (1) the murder took place after the defendant committed rape and burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was especially heinous, atrocious, and cruel; (4) the murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. The trial court found no mitigating circumstances.

On direct appeal to the Florida Supreme Court, the petitioner complained that: (1) the trial court committed reversible error and violated the sixth and fourteenth amendments to the United States Constitution and article 1, section 16 of the Florida Constitution, by refusing to allow him to re-open his case in order to present newly discovered exculpatory evidence, via the testimony of Waters, which was discovered after the technical close of all the evidence, but prior to any argument or instruction of law being given the jury; (2) the trial court erroneously found the aggravating circumstance of cold, calculated and premeditated murder, in that said finding was unsupported by the evidence and the finding constituted a doubling-up of the aggravating circumstance of especially heinous, atrocious or cruel murder and (3) as applied, section 921.141, Florida Statutes (1983), violates the sixth and fourteenth amendments to the United States Constitution by denying a defendant due process of law, in that the existence of aggravating and/or mitigating circumstances, as questions of fact, are found by the trial judge as opposed to a jury of the defendant's peers.

The convictions and sentences were affirmed by the Florida Supreme Court in Wright v. State, 10 F.L.W. 364 (Fla. July 3, 1985). The court found that the trial judge erroneously

applied the sequestration rule as a strict rule of law and failed to evaluate whether or not Waters' testimony was affected to any substantial degree by her presence in the courtroom or conversations with trial spectators. The court determined, however, that the error was harmless:

> Having determined that the trial court erred, we must now consider whether that error was harmless. The record indicates Kathy Waters would have testified that, shortly after midnight on February 6, she saw three persons in the neighborhood of the victim's house; that an individual of the appellant's general description was walking in the opposite direction from the victim's home, and that she knew appellant and would have offered him a ride had she recognized the person on Highway 19 as appellant. The record already contained unrefuted testimony that three individuals were gathered near the victim's home. The defense did not contend that the proffered witness would purport to identify appellant as being the person she observed on the road or that her testimony, if accepted by the jury, would require a finding by the jury that appellant did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt. See, United States v. Hasting, 461 U.S. 499 (1983); Chapman v. California, 386 U.S. 18 (1967); Gurganus v. State, 451 So.2d 817 (Fla. 1984). Cf. United States v. Webster, 750 F.2d 307 (5th Cir. 1984), cert denied, 105 S.Ct. 2340 (1985). United States v. Smith, 736 F.2d 1103 (6th Cir.), cert. denied, 105 S.Ct. 213 (1984).

10 F.L.W. 365-366.

The Florida Supreme Court agreed with the petitioner and found that the trial court erred in finding the murder to be cold, calculated and premeditated, but because the trial court properly found there were no mitigating and three aggravating circumstances, it was unnecessary to remand for a new sentencing hearing. 10 F.L.W. 366.

The Florida Supreme Court further noted that it had previously considered and expressly rejected the argument that the existence of aggravating and/or mitigating circumstances, as questions of fact, should be found by the jury rather than the trial judge. 10 F.L.W. 366.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

"This court can deal with a certain number of cases on the merits in any given Term, and therefore some judgment must attend the process of selection." Torres-Valencia v. United States, 104 S.Ct. 385, 78 L.Ed.2d 40 (1983)(Rehnquist, J., dissenting). If the alleged errors complained of had been committed by a federal court, the Court's assumption of jurisdiction arguably would be a proper exercise of its supervisory powers over the federal judicial system. See, Supreme Court Rule 17.1(a). Or if the case raised a novel question of federal law on which there was a divergence of opinion, the assumption of jurisdiction would be proper in order to clarify the law. Rule 17.1(b) and (c). Or if there were reason to believe that the state court refused to apply federal precedent because of its hostility to this Court's interpretation of the Constitution, the Court might have an obligation to act summarily to vindicate the supremacy of federal law. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958). No such consideration is present in this case.

> A. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT EXCLUSION OF THE TESTIMONY OF A DEFENSE WITNESS WHO HAD VIOLATED THE RULE OF SEQUESTRATION WAS HARMLESS ERROR AS THIS QUESTION IS SO EXPLICITLY FORECLOSED BY PRIOR DECISIONS OF THIS COURT AS TO LEAVE NO ROOM FOR REAL CONTROVERSY. THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY, AND THE ISSUE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

While it would appear that a federal question was properly raised in the state court proceedings and that the highest state court passed upon the federal question, the petition for writ of certiorari cannot properly be granted on the basis of this claim. In the case sub judice, the federal question is so explicitly foreclosed by prior decisions of this Court, as to leave no room for real controversy. A review by this Court would involve only factual determinations applied under familiar legal rules, and, in fact, this Court's own prior decisions are controlling. Nothing has been shown by petitioner

to warrant a re-examination of settled principles. This Court has long held that a valid conviction need not be overturned by the mere presence of error that is harmless. United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974 (1983); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967).

The decision below gave full consideration to the issues and decided them correctly. The facts of the case speak volumes as to why the exclusion of Waters' testimony was not harmful error. The petitioner confessed to Charles Westberry that he entered the victim's house through a back window to take money from her purse. Petitioner had entered the victim's home through that same window and stolen money one month before. He admitted to Westberry that he cut the elderly victim's throat because she recognized him and he did not want to return to prison. A sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to the petitioner. Contrary to petitioner's assertion, the evidence of guilt was not weak. That anyone in the world other than the defendant could have committed the crime is always an available theory. None of the three people alleged to have been walking down the victim's street after 12:00 p.m., confessed to the crime nor was there any evidence linking them to the crime, nor were they described as armed, dangerous or even suspicious. Waters herself opined that this was not an unusual place for people to be and she did not see them walking back down the street toward the victim's house (A. 50). This nebulous theory was placed before the jury at trial vis-a-vis the unrefuted testimony of another witness that three individuals were gathered near the victim's home. Repetition does not elevate the unpersuasive to the convincing. This cumulative evidence could not have reasonably changed the verdict, nor the exclusion of it have contributed to the conviction in the absence of some more compelling facts about these three unknown, unnamed and uncharacterized people.

Waters would also have testified that on the same evening, at the same time, an individual of the petitioner's

general description was walking in the opposite direction from the victim's home, and that she knew the petitioner and would have offered him a ride had she recognized the person on Highway 19 as the petitioner. The defense never contended that the proffered witness would purport to identify the petitioner as being the person she observed on the road, or that her testimony, if accepted by the jury, would require a finding by the jury that the petitioner did not commit the murder. The crux of Waters' entire testimony would reflect only that this is an area where numerous people walk, many of whom are unknown to Waters. There was more than sufficient evidence to convict the petitioner and placing the proffered testimony before the jury would have made the state's evidence no less damning and would certainly have not led to a conclusion that the petitioner was innocent.

An important consideration, is that the Florida Supreme Court, while finding such error to be harmless, did announce, however, that such actions violate both state and federal law. For this reason, the facts of this case are peculiar and not likely to recur, as the highest state court has made it abundantly clear to the lower courts that such an action, however well-meaning, is improper. In cases where such error is not harmless, reversal is virtually ensured. The issues, therefore, are not sufficiently important to warrant this Court's attention. Contrary to the petitioner's assertion, Florida does not apply its rule of sequestration to the detriment of defendants, and has expressly ruled that the rule of sequestration must not be enforced in such a manner that it produces injustice, and that the enforcement of such rule implicates the defendant's sixth amendment right to present witnesses in his own behalf. Steffanos v. State, 80 Fla. 309, 86 So. 204 (1920); See, Steinhorst v. State, 412 So.2d 332 (Fla. 1982). The instant Florida rule is designed merely to enhance the search for truth in the criminal trial. Moreover, this Court's decision in Holder v. United States, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893), makes it abundantly clear that a witness

cannot be excluded on the mere ground that he has disobeyed or violated a sequestration order. The decision below is in accordance with this decision and there is no reason to believe that the state court refused to apply federal precedent because of its hostility to this Court's interpretation of the constitution. Furthe., the exclusion of such non-probative evidence is harmless error in accordance with the dictates of other decisions of this Court. The petitioner's assertion that the Florida Supreme Court applied the wrong test in determining harmless error, constitutes mere semantic dueling. A conclusive finding that the excluded evidence would not have affected the verdict encompasses the lesser conclusion that there is no reasonable possibility that the evidence complained of might have contributed to the conviction.

B. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DECISION THAT THE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES AS QUESTIONS OF FACT MAY BE FOUND BY THE TRIAL JUDGE RATHER THAN BY THE JURY AS THIS QUESTION HAS BEEN DISPOSED OF BY THIS COURT ON NUMEROUS OCCASIONS.

The Court twice has concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily. Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.).

The petitioner contends that this Court has never addressed the issue of whether the trial judge rather than the jury can find the existence of aggravating or mitigating circumstances in regard to the sixth amendment guarantee to a trial by jury on issues of guilt in all criminal prosecutions. This Court, however, stated in Spaziano v. Florida, ___U.S.___, 104 S.Ct. 3154, 3162 (1984):

> . . . The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth

> Amendment's guarantee of a jury trial. The Court's concern in Bullington was with the risk that the State, with all its resources, would wear a defendant down, thereby leading to an erroneously imposed death penalty. 451 U.S., at 445, 101 S.Ct., at 1861. There is no similar danger involved in denying a defendant a jury trial on the sentencing issue of life or death. The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. Arizona v. Rumsey, supra. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding -- a determination of the appropriate punishment to be imposed on an individual. See, Lockett v. Ohio, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-1965, 57 L.Ed.2d 973 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion), citing Pennsylvania ex rel. Sullivan, v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937), and Williams v. New York, 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

The petitioner next contends that Florida's sentencing procedure conflicts with the spirit of Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), as "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." The Court, however, also addressed this issue in Spaziano, supra:

> Imposing the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice can be expressed. This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable. See, e.g., Gregg v. Georgia, supra; Woodson v. North Carolina, 428 U.S., at 302-303, 96 S.Ct., at 2990-2991; Zant v. Stephens, __U.S., at __, 103 S.Ct. at 2744. The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the "community's voice" is not given free rein. The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined. See, Gregg v. Georgia, 428 U.S., at 183-184, 96 S.Ct. at 2929-2930

(joint opinion); Furman v. Georgia, 408 U.S. at 394-395, 92 S.Ct., at 2806-2807 (BURGER, C.J., dissenting); Id.,at 452-454, 92 S.Ct., at 2835-2836 (POWELL, J., dissenting).

* * *

> We do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State. See, Gregg v. Georgia, 428 U.S., at 181, 96 S.Ct., at 2928 (joint opinion); Williams v. Florida, 399 U.S. 78, 100, 90 S.Ct. 1893, 1905, 26 L.Ed.2d 446 (1970); Duncan v. Louisiana, 391 U.S., at 156, 88 S.Ct., at 1451; Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775, n.15, 20 L.Ed.2d 776 (1968). The point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.

104 S.Ct. at 3164.

The functioning of the jury in the sentencing phase is not the same as the function of the jury in the guilt phase. The role of the jury is merely advisory and there is no reason for the jury to make findings of fact as to the appropriateness of imposing the death sentence, when the trial judge and not the jury is the sentencer. This Court in Proffitt, supra, approved the role of the jury under Florida's death penalty statute as advisory only. Petitioner's arguments reflect only the long held wish for the jury as sentencer urged upon this Court previously. This question is so explicitly foreclosed by prior decisions of this Court as to leave no room for real controversy.

CONCLUSION

Petitioner raised two questions which urge review by this Court. Respondent respectfully submits each fails to demonstrate that review is necessary, or that a substantial federal question is involved. To the extent that this Court may conclude otherwise, the State of Florida submits that the decision rendered by the Florida Supreme Court in this cause is clearly correct; that this Court should deny plenary review; and, that it should summarily affirm the decision of the Florida Supreme Court.

ty dollars ($20) court costs on each case (a total of $60) court costs.

[Respondent's] conduct in this matter was directly related to the psychological and emotional conditions of [respondent], which is now being professionally treated. The Florida Bar, Case No. 86B84H49, which is presently before the Pasco County Grievance Committee, Sixth Judicial Circuit, "B", is based upon the conduct that was the subject of criminal charges.

3. The [respondent] hereby waives confidentiality of this proceeding and of all pending disciplinary matters, pursuant to Florida Bar Integration Rule, article XI, Rule 11.02(4)(a).

4. [Respondent] agrees to cooperate fully with investigations made in connection with the Client Security Fund of The Florida Bar.

5. [Respondent] will make all reasonable efforts to reimburse those who suffered monetary losses as a result of his failure to perform in his professional capacity or professional misconduct. [Respondent] will also make all reasonable efforts to reimburse the Client Security Fund of The Florida Bar for payments made by the Fund as a result of his conduct.

6. [Respondent] freely and voluntarily submits this Petition to Resign and further agrees that it is without leave to reapply for readmission for a period of three (3) years or until such time as [respondent] has completed his term of probation and both The Florida Bar and [respondent's] primary treating psychologist feel that [respondent] is emotionally capable of resuming the active practice of law.

The Florida Bar having stated that it does not oppose the Petition for Leave to Resign and the Court having reviewed the Petition and determined that the requirements of Rule 11.08(3) are fully satisfied, the Petition for Leave to Resign is hereby approved. This resignation shall be effective August 2, 1985, thereby giving respondent thirty (30) days to close out his practice and take the necessary steps to protect his clients and respondent shall not accept any new business.

It is so ordered. (ADKINS, Acting Chief Justice, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur.)

* * *

Attorneys—Discipline—Conduct involving dishonesty, fraud, deceit or misrepresentation—Conduct adversely reflecting on fitness to practice law—Suspension

THE FLORIDA BAR, Complainant, vs. DONALD J. SWANSON, Respondent. Supreme Court of Florida. Case No. 65,839. July 3, 1985. Original Proceeding—The Florida Bar: John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida, and Jacqueline Plasencia Nesbitt-Imas, Bar Counsel, Fort Lauderdale, Florida, for Complainant. Robert J. O'Toole, Fort Lauderdale, Florida, for Respondent.

(PER CURIAM.) This disciplinary proceeding by The Florida Bar against Donald J. Swanson, a member of The Florida Bar, is presently before us on complaint of The Florida Bar and report of referee. Pursuant to article XI, Rule 11.06(9)(b) of the Integration Rule of The Florida Bar, the referee's report and record were duly filed with this Court. No petition for review pursuant to Integration Rule of The Florida Bar 11.09(1) has been filed.

Having considered the pleadings and evidence, the referee found respondent guilty of Count One of the Complaint of The Florida Bar as to each ethical violation: Disciplinary Rule 1-102(a)(1)—A lawyer shall not violate a disciplinary rule; Disciplinary Rule 1-102(a)(4)—A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and Disciplinary Rule 1-102(a)(6)—A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law. The referee further found respondent not guilty as to Count Two of the Complaint of The Florida Bar as to each of the same ethical violations.

The referee recommends that respondent be suspended from the practice of law for a fixed period of twelve months and thereafter, until:

1. He shall prove his rehabilitation pursuant to Rule 11.10(4).

2. Enroll in, and successfully complete with a grade of no less than "C", or its equivalent, from an accredited law school in the State of Florida, a course in Ethical Conduct by attorneys authorized to practice law in the State of Florida.

3. Pay the costs of these proceedings in the amount of $1,642.83.

Having carefully reviewed the record, we approve the findings and recommendations of the referee.

Accordingly, respondent, Donald J. Swanson is suspended from the practice of law for a period of twelve (12) months on the conditions set forth above. Respondent's suspension shall be effective August 2, 1985, thereby giving respondent thirty (30) days to close out his practice and take the necessary steps to protect his clients. Respondent shall not accept any new business.

Judgment for costs in the amount of $1,642.83 is hereby entered against respondent, for which sum let execution issue.

It is so ordered. (ADKINS, Acting Chief Justice, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur.)

* * *

Criminal law—Murder—Death penalty—Error to exclude testimony of witness who came forward on own volition after attending portions of trial, following newspaper accounts of trial and discussing testimony with various persons who attended trial without conducting inquiry as to whether inadvertent violation of sequestration rule affected witness' testimony—Error harmless under circumstances—Evidence of defendant's participation in prior burglary of victim's home utilizing identical point of entry used on date of victim's murder properly admitted—Sentencing—Aggravating circumstances—Proper to find murder committed after rape and burglary and murder heinous, atrocious or cruel—Proper to find murder committed for purpose of avoiding arrest where evidence reflected that defendant murdered victim because she could identify him and he did not want to return to prison—Error to find murder committed in cold, calculated and premeditated manner—Death sentence properly imposed—Imposition of death penalty proportionately correct

JOEL DALE WRIGHT, Appellant, vs. STATE OF FLORIDA, Appellee. Supreme Court of Florida. Case No. 64,349. July 3, 1985. An Appeal from the Circuit Court in and for Putnam County, James B. Odom, Public Defender and Larry B. Henderson, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida, for Appellant. Jim Smith, Attorney General and Margene A. Roper, Assistant Attorney General, Daytona Beach, Florida, for Appellee.

(PER CURIAM.) The appellant, Joel Dale Wright, was convicted of first-degree murder, sexual battery, burglary of a dwelling, and second-degree grand theft. In accordance with the jury's sentence recommendation, the trial judge imposed the death sentence for the first-degree murder. The appellant also received sentences of 99 years for sexual battery, 15 years for burglary, and 5 years for grand theft. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm the convictions and sentences.

The facts reflect that the body of a 75-year-old woman was found in the bedroom of her home on February 6, 1983. The victim was discovered by her brother, who testified that he became concerned when she failed to respond to his knock on the door. Finding all the doors to her home locked, he entered through an open window in the rear of the house and subsequently found her body. Medical testimony established that the victim died between the evening of February 5 and the morning of February 6 as a result of multiple stab wounds to the neck and face, and that a vaginal laceration could have contributed to the victim's death.

The state's primary witness, Charles Westberry, testified that shortly after daylight on the morning of February 6, appellant came to Westberry's trailer and confessed to him that he had killed the victim.

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tim, that appellant told him he entered the victim's house through a back window to take money from her purse and, as appellant wiped his fingerprints off the purse, he saw the victim in the hallway and cut her throat, and that appellant stated he killed the victim because she recognized him and he did not want to go back to prison. Westberry further stated that appellant counted out approximately $290 he said he had taken from the victim's home and that appellant asked Westberry to tell the police that appellant had spent the night of February 5 at Westberry's trailer. When Westberry related appellant's confession to his wife several weeks later, she notified the police. The record also reflects that a sheriff's department fingerprint analyst identified a fingerprint taken from a portable stove located in the victim's bedroom as belonging to appellant, and that, over appellant's objection, the court instructed the jury on the *Williams* rule and permitted Paul House to testify for the state that approximately one month before the murder, he and appellant had entered the victim's home through the same window that was found open by the victim's brother, and had stolen money.

In his defense, appellant denied involvement in the murder and introduced testimony that, between 5:00 and 6:00 p.m. on February 5, a friend had dropped him off at his parents' home, which neighbored the victim's, and that he left at 8:00 p.m. to attend a party at his employer's house. Testifying in his own behalf, appellant stated that he returned to his parents' home, where he resided, at approximately 1:00 a.m. on February 6, but was unable to get into the house because his parents had locked him out. Appellant testified that he then walked by way of Highway 19 to Westberry's trailer, where he spent the night. Appellant also presented a witness who testified that, late in the night of February 5 and early in the morning of February 6, he had seen a group of three men whom he did not recognize in the general vicinity of the victim's home.

After the close of the evidence but prior to final arguments, appellant proffered the newly discovered testimony of Kathy Waters, who had listened to portions of the trial testimony, followed newspaper accounts of the trial, and discussed testimony with various persons attending the trial. Her proffered testimony revealed that, shortly after midnight on February 6, she had observed a person, who may have been similar in appearance to appellant, walking along Highway 19, and had also seen three persons, whom she did not recognize, congregated in the general vicinity of the victim's house. The trial court denied appellant's motion to re-open the case, noting that the rule of sequestration is rendered "meaningless" when a witness is permitted "to testify in support of one side or the other almost as if that testimony were 'tailor-made,' after the witness has conferred with numerous people concerning the case." The jury found appellant guilty as charged.

Appellant, in the penalty phase, presented the testimony of members of his family relating to his character and upbringing, as well as a nine-year-old psychological report which indicated that at that time appellant was depressed, emotionally immature, and had difficulty controlling his impulses. By a nine-to-three vote, the jury recommended that appellant receive the death sentence.

Guilt Phase

The appellant challenges his first-degree murder conviction on the grounds that the trial court erred in: (1) restricting appellant's right to cross-examine several witnesses, (2) permitting a witness to comment upon appellant's exercise of his right to remain silent, (3) restricting defense counsel's final argument and/or refusing to instruct the jury on the law governing circumstantial evidence, (4) refusing to allow the appellant to present the testimony of Kathy Waters, and (5) instructing the jury to consider evidence of appellant's prior burglary of the victim's house. Appellant also challenges his grand theft conviction on the ground that the corpus delicti was not established other than by appellant's confession. We reject each of appellant's contentions and find only the issues relating to the exclusion of Waters' testimony and the admissibility of the *Williams* rule evidence merit discussion.

With regard to the first issue for discussion, appellant contends it was reversible error for the trial judge to deny the proffered witness an opportunity to testify. The record reveals that, during the hearing held by the trial court on the matter, the defense asserted that Waters' observation of three persons in the vicinity of the victim's home and one person walking on State Road 19 was relevant and exculpatory in that it tended to corroborate appellant's otherwise uncorroborated testimony and could imply to the jury that others had an opportunity to break into the victim's home and kill her. While acknowledging that "there is no question that the violation of the rule [of sequestration] was inadvertent," the state argued that it "could very well be substantially prejudiced" if the witness was permitted to testify. The transcript of the hearing also reflects that the excluded witness did not become aware of the fact that she possessed relevant information until the morning her testimony was proffered, at which time she came forward of her own volition. In ruling to exclude the evidence, the trial judge attributed no "bad motive or bad faith" to the defense or its failure to proffer the testimony before the close of the evidence. In declaring that the sequestration rule would be rendered "meaningless" if the witness were allowed to testify, it is clear that the trial judge applied that rule as a strict rule of law. This Court has frequently pointed out that the rule of sequestration is intended to prevent a witness's testimony from being influenced by the testimony of other witnesses in the proceeding. *See Strickhorst v. State*, 412 So. 2d 332 (Fla. 1982); *Calhoun v. State*, 403 So. 2d 936 (Fla. 1981), *cert. denied*, 456 U.S. 925 (1982); *Dumas v. State*, 350 So. 2d 464 (Fla. 1977); *Spencer v. State*, 133 So. 2d 729 (Fla. 1961), *cert. denied*, 369 U.S. 880 (1962). We have expressly stated the rule must not be enforced in such a manner that it produces injustice. *Sirfluvia v. State*, 80 Fla. 309, 86 So. 204 (1920). Further, we have recognized that enforcement of the rule against a defendant seeking to introduce the testimony of a witness who has heard testimony in violation of the rule implicates the defendant's sixth amendment right to present witnesses in his own behalf. *See Strickhorst; cf. Williams v. Florida*, 399 U.S. 78, 83 n.14 (1970). Before it excludes testimony on the ground that the sequestration rule was violated, the trial court must determine that the witness's testimony was affected by other witnesses' testimony to the extent that it substantially differs from what it would have been had the witness not heard the testimony. Because of the sixth amendment ramifications, the court must carefully apply this test before it excludes any material testimony offered by a defendant in a criminal case, and should also consider whether the violation of the rule of sequestration was intentional or inadvertent and whether it involved bad faith on the part of the witness, a party, or counsel. In the instant case, the trial judge found the violation was inadvertent, but failed to evaluate whether or not Waters' testimony was affected to any substantial degree by her presence in the courtroom or conversations with trial spectators. We realize that trial courts must, of necessity, have discretion in the enforcement of the rule of sequestration. In the instant case, we find the trial judge erred in failing to exercise his discretion to determine whether exclusion was warranted under the circumstances, and, instead, applied the sequestration rule as a strict rule of law.

Having determined that the trial court erred, we must now consider whether that error was harmless. The record indicates Kathy Waters would have testified that, shortly after midnight on February 6, she saw three persons in the neighborhood of the victim's house, that an individual of the appellant's general description was walking in the opposite direction from the victim's home, and that she knew appellant and would have offered him a ride had she recognized the person on Highway 19 as appellant. The record already contains unrefuted testimony that three individuals were gathered near the vi-

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tim's home. The defense did not contend that the proffered witness would purport to identify appellant as being the person she observed on the road or that her testimony, if accepted by the jury, would require a finding by the jury that appellant did not commit the murder. Based upon our review of the record, including the nature of the proffered testimony, we conclude that the excluded evidence would not have affected the verdict and its exclusion was harmless beyond a reasonable doubt. *See United States v. Hasting*, 461 U.S. 499 (1983); *Chapman v. California*, 386 U.S. 18 (1967); *Gurgonus v. State*, 451 So. 2d 817 (Fla. 1984). *Cf. United States v. Webster*, 750 F.2d 307 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2340 (1985); *United States v. Smith*, 736 F.2d 1103 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984).

The second issue concerns appellant's assertion that the trial court committed reversible error by allowing the jury to consider evidence of a prior crime committed by appellant "for the limited purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident on the part of the defendant."* In *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959), this Court held that evidence of another crime is admissible when relevant to prove a material issue, unless it is relevant only to show bad character or propensity. *See also Shriner v. State*, 386 So. 2d 525 (Fla. 1980), *cert. denied*, 449 U.S. 1103 (1981). *Ashley v. State*, 265 So. 2d 685 (Fla. 1972). The *Williams* holding is codified by section 90.404(2)(a), Florida Statutes (1983), and incorporated into Florida Standard Jury Instructions. In *Drake v. State*, 400 So. 2d 1217 (Fla. 1981), we stated that to be legally relevant to show identity, it is not enough that the factual situations sought to be compared bear a "general similarity" to one another. Rather, the situations must manifest "identifiable points of similarity." *Id.* at 1219. We find the evidence that appellant had previously burglarized the victim's house and, in so doing, had utilized the identical point of entry used on the date of the victim's murder, is, under the *Williams* rule, legally relevant to show identity and to show that Wright knew that point of entry was available. We also note that appellant utilized this evidence in testifying that his fingerprint had been left in the victim's bedroom when he and Paul House burglarized her residence.

Sentencing Phase

In imposing the death sentence, the trial judge found the following four aggravating circumstances: (1) the murder took place after the defendant committed rape and burglary; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was especially heinous, atrocious, and cruel; (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial court found no mitigating circumstances. The appellant raises four challenges to the sentencing phase of his trial: (1) the trial court erred in finding that the murder was committed for the purpose of preventing a lawful arrest; (2) the trial court erred in finding that the murder was cold, calculated, and premeditated; (3) section 921.141, Florida Statutes (1983), violates the federal constitution by depriving the appellant of his right to a trial by his peers; and (4) Florida's capital sentencing statute is unconstitutional on its face and as applied. We have previously considered and expressly rejected the latter two arguments. *See, e.g., Johnson v. State*, 393 So. 2d 1069 (Fla. 1980), *cert. denied*, 454 U.S. 882 (1981); *Proffitt v. Florida*, 428 U.S. 242 (1976), *aff'g* 315 So. 2d 461 (Fla. 1975).

Appellant's first contention is without merit. He argues that, because the victim was not a law enforcement officer, the trial judge's finding that the murder was committed to prevent arrest is defective because it fails to show that the dominant motive was the elimination of a witness. The record reflects that Westberry testified appellant admitted he killed the victim because she recognized him and he did not want to return to prison. This evidence supports the trial judge's finding that appellant committed the capital felony for the purpose of avoiding arrest. *See Clark v. State*, 443 So. 2d 973 (Fla. 1983), *cert. denied*, 104 S. Ct. 2400 (1984); *Johnson v. State*, 442 So. 2d 185 (Fla. 1983), *cert. denied*, 104 S. Ct. 2182 (1984); *Vaught v. State*, 410 So. 2d 147 (Fla. 1982).

We agree with appellant's assertion that the trial court erred in finding the murder to be cold, calculated, and premeditated. This aggravating circumstance is generally found in murders that, by the nature, exhibit a heightened degree of premeditation, such as contract or execution-style murders. *See Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *Washington v. State*, 432 So. 2d 44 (Fla. 1983); *McCray v. State*, 416 So. 2d 804 (Fla. 1982). Such heightened premeditation was not proved beyond a reasonable doubt in this case. Because the court properly found there were no mitigating and three aggravating circumstances, we conclude the imposition of the death penalty was correct and find it unnecessary to remand for a new sentencing hearing. *See James v. State*, 453 So. 2d 786 (Fla.), *cert. denied*, 105 S. Ct. 608 (1984); *White v. State*, 403 So. 2d 331 (Fla. 1981), *cert. denied*, 103 S. Ct. 3571 (1983); *Demps v. State*, 395 So. 2d 501 (Fla.), *cert. denied*, 454 U.S. 933 (1981); *Elledge v. State*, 346 So. 2d 998 (Fla. 1977). We also find the imposition of the death penalty in this case is proportionately correct. *See, e.g., Stewart v. State*, 420 So. 2d 862 (Fla. 1982), *cert. denied*, 460 U.S. 1103 (1983); *Booker v. State*, 397 So. 2d 910 (Fla.), *cert. denied*, 454 U.S. 93 (1981); *King v. State*, 390 So. 2d 315 (Fla. 1980), *cert. denied*, 450 U.S. 989 (1981), *receded from on other grounds, Strickland v. State*, 437 So. 2d 150 (Fla. 1983).

For the reasons expressed, we affirm appellant's convictions and sentence of death.

It is so ordered. (BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur.)

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*See Fla. Std. Jury Instr. (Crim.), "Williams Rule." That instruction reads:

> The evidence you are about to receive concerning the alleged commission of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving [motive] [opportunity] [intent] [preparation] [plan] [knowledge] [identity] [the absence of mistake or accident] on the part of the defendant and you shall consider it only as it relates to those issues.
>
> However, the defendant is not on trial for a crime that is not included in the [information] [indictment].

We agree with appellant that the trial judge would have been well-advised to have his instruction to those bracketed elements that were applicable under the facts of the case; however, the judge's failure to so have the instruction was not error.

* * *

Attorneys—Discipline—Permanent resignation pending disciplinary proceedings

THE FLORIDA BAR, Complainant, vs. LLOYD AUSTIN LYDAY, Respondent. Supreme Court of Florida. Case No. 66,747. July 3, 1985. Original Proceeding—The Florida Bar, David R. Ratcliff, Bar Counsel, Tampa, Florida, for Complainant; and Edwin T. Mulock of Mulock and Barkdull, Bradenton, Florida, for Respondent.

(PER CURIAM.) This matter is before the Court on respondent's Petition and Amended Petition for Leave to Resign pending disciplinary proceedings, pursuant to article XI, Rule 11.08 of the Integration Rule of The Florida Bar.

Respondent states in his petition that Florida Bar Case Nos. 12B85H38 and 12B85H39 are pending against him and Florida Bar Case No. 12B85H02 was a past disciplinary action against him which was resolved by an admission of minor misconduct which was accepted by the grievance committee. Respondent further states that there are no original proceedings pending against him and that his resignation is of a permanent nature.

The Florida Bar filed its response stating that it supports respondent's Amended Request for Leave to Resign permanently and that

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